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ABSTRACT

A strictly legal rights approach to freedom of expression is inadequate because it fails to acknowledge that such freedom rests on a set of assumptions that are not adequately met in the United States, and so make that system ineffectual. The first assumption is that speech can influence the beliefs and behavior of those to whom it is addressed; but this country's increasingly centralized wealth and political power create self-interest groups capable of opposing the messages of others' free speech. The second assumption is that those who have a stake in decision making (all citizens) will have the motivation and communication competence to express themselves; but rampant illiteracy and inadequate education leave a vast number of Americans at a disadvantage. The third assumption is the "de facto" freedom to express oneself; but often citizens prefer silence to censure from family, employers, and neighbors, or to harrassment from vigilante groups. The final condition for free speech is access to channels through which it can reach its intended audience; but this access remains contingent upon media "gatekeepers" and is reserved for the wealthy. Creation of publicly owned competing channels in radio, television, and newsprint is one possible solution. However, the legal right of expression must be woven into the psychological and economic fabric of American society to make the First Amendment more of a right than an empty promise. (HTH)

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BEYOND FREE SPEECH: A CRITICAL EXAMINATION OF THE REALITIES SURROUNDING THE FIRST AMENDMENT*

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For those of us whose profession is devoted in large measure to defending the philosophy of freedom of expression and educating students in its praxis, it is more than a little troubling to be confronted with the proposition that we may be engaged in a meaningless charade. Whether the challenge is that freedom of speech is an opiate of the people, administered to make us believe we are participating in the control of our lives when we are not,[1] or alternatively, that the forces of modern technology and mass culture have made the First Amendment an anachronism,[2] we are left with the uneasy feeling that the effort which is made to keep the legal protections of free speech intact, even for the most marginal kinds of communication, is misplaced energy which might better be spent on problems more relevant to the real world.

Although we are likely on further reflection to arrive at the more balanced conclusion that what is done to fortify the First Amendment is not in vain, it does seem an avoidance of reality not to recognize that a strictly legal-rights approach to freedom of expression in our society is by itself inadequate. It ignores the economic and psychological context in which the legal right to speak is embedded and, in so doing, fails to appreciate that the viability of a system of freedom of expression rests on a set of assumptions which, if not met, render that system ineffectual. Indeed, it is the thesis of this paper that several of the conditions on which a meaningful system of freedom of speech depends are problematic in contemporary American society and growing moreso by the day. It shall be my purpose here to examine these circumstances with the end in view of determining what may be necessary to bring about a state of affairs in which the constitutional guarantees of the First Amendment are truly worth preserving.

The most fundamental of the preconditions for meaningful communication is, of course, the possibility that speech can influence the beliefs or behavior of those to whom it is addressed. If the votes of legislators are shaped primarily, not by mail or visits from their constituents, not by testimony before their committees nor persuasion by their colleagues, but by financial contributions to their campaigns or orders from their party leaders, it is relatively pointless for the citizenry to try to talk with them. If the decisions of those with executive power spring more from self-interest or ideological precommitment than from the influence of rational discourse, the efficacy of communicating with them is diminished. If racial

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prejudice, national chauvinism, economic insecurity, and socio-religious dogma dominate the perceptions of large segments of the public, there is little likelihood that any speakers but those who cater to their predilections will be heard, much less heeded.

Does it do any good, therefore, to talk today in America -- more particularly to advocate such causes as the abolition of handguns, the abandonment of nuclear power, or a more equitable sharing of the nation's wealth? I select these examples because they are preeminently topics on which power and prejudice appear to speak more successfully than words and reason and on which it sometimes seems that only the generation of sufficient contervailing power will ever change the minds of the decision-makers. So long as the National Rifle Association can intimidate legislators more effectively than anyone else can persuade them, it does not seem to matter that a vast majority of the people may want to limit sharply or entirely abolish the traffic in handguns. So long as an insatiable appetite for energy and a fantasy of "survivability" in nuclear war dominate the so-called thought processes of our populace there is little likelihood of the dismantling of nuclear power plants or the scrapping of hydrogen bombs even if the most overwhelming evidence and logic support that course of action. So long as control of the world's economic resources is viewed as a zero-sum game in which the Haves believe they can safely and indefinitely exploit the earth's bounty while the Have-Nots starve or barely survive in desperate poverty, and so long as most people continue to believe that it is not in their own self-interest to become less self-indulgent, the appeals of those who warn of the short-sightedness of such delusions will go unheeded.

To be sure, not all of the attitudes which people hold on various subjects nor all of the public policy decisions which are made are so impervious to persuasion as those just identified. It is clear that public dialogue eventually extricated us from Vietnam, drove Richard Nixon from the White House, and, for better or worse, has brought us Ronald Reagan, Jesse Helms, and the Moral Majority. And if the First Amendment is still around in 1984 it could be the vehicle for our liberation from Ronald Reagan, Jesse Helms, and the Moral Majority.

In short, the communication process works in some areas and not in others, its efficacy apparently dependent on how firmly entrenched are the powers and self-interests which oppose its messages. What concerns me about present-day trends in our country is the ever-increasing centralization and concentration of power -- economic, political, technological, cultural -- in fewer and fewer hands. Economies of scale, they call it, but I suggest that smaller is not only more beautiful,[3] but that it is essential if persuasion is to survive. As my colleague Dean Barnlund and I wrote two decades ago in The Dynamics of Discussion, at a time when we erroneously predicted a trend in the right direction:

> When one person or a few people in a group possess all the guns, muscles, or money, and the others are relatively weak and helpless, optimum conditions do not exist for discussion . . . Discussion in such circumstances occurs only at the sufferance of the powerful; and generous as these persons may sometimes be, they are not likely voluntarily to abdicate their power when vital interests are at stake . . . . the

biggest boys in the gang can bring discussion to a screeching halt the moment they take a notion to do so. "A democracy can be such in fact," said Theodore Roosevelt, "only if . . . we are all of about the same size."[4]

A second basic premise of a meaningful system of freedom of speech is that those who have a stake in the decisions which are made -- which means all members of society where public policy questions are concerned -- will have the motivation, the communication competency, and the de facto as well as the de jure freedom to express themselves. The First Amendment, even if vigorously enforced, guarantees only freedom from government interference with speech and press; it does not and cannot assure that any particular individual or group will exercise the freedom to become a participant in the public forum.[5] Let us look separately at each of these facets of the freedom to express oneself.

First, the motivational ingredient. Aside from such inevitable factors as the degree to which a particular issue may or may not affect one's life, or individual differences in general levels of energy or emotionality, it seems logical that the most powerful force affecting the motivation to speak is the perception by a would-be communicator that his or her participation will make a difference -- which takes us back to the first precondition for a viable system of freedom of expression, which has already been discussed. If people do not think it efficacious to speak up they can hardly be expected to bother, unless it be for a bit of catharsis. The vast and steadily growing numbers of citizens who do not vote in our elections, not to mention the widespread passivity of students in the schools and employees in the workplace, are rather gloomy evidence that catharsis is not enough to motivate expression, at least not the kind of expression which can be heard beyond the coffee klatch or the bar.

There is another influence on the motivation to speak which is often overlooked but has troubling implications for a culture whose consciousness is so dominated, as ours is today, by a handful of mass-media sources of information and values. The urge to express oneself springs, at least in some measure, from the perception that one's views are different from those that have already been articulated by others. As Alexander Meiklejohn once said of the need for freedom of speech in a self-governing society, "What is essential is not that everyone should speak, but that everything worth saying shall be said."[6] If the range of knowledge, attitudes and perceived self-interest is substantially narrowed by national media exposure to a relatively homogenous bill of fare, it should not surprise us that fewer and fewer people will have anything unique to contribute to the public dialogue.

To be sure, there are other forces at work besides the media which may produce a variety of perspectives -- regional loyalties, racial and ethnic ties, religious heterodoxy, and socio-economic class differences, to mention perhaps the most important. But even some of these have been run through the American blender, if not to the setting of "Puree" then perhaps to "Chop" or "Grate." What is more, the rich variety of physical, emotional and intellectual personality types which is inevitably created from the genetic pool of 200 million human beings often finds its authentic expression only at the interpersonal level of interaction and gets washed out into depressing conformity as people

move into the public realm, if indeed they ever do. If one doubts this he or she need only listen to a radio call-in show discussing some current public issue or view a set of TV person-in-the-street interviews seeking reactions to some dramatic public event to be reminded of the sterotypic mindlessness of most of the comments.

It is difficult to envision how we can get from this point to a state of affairs in which greater numbers of our citizens would have more things "worth saying" (to borrow Meiklejohn's phrase) because the stimuli in their environment would have enhanced rather than diminished the uniqueness of their world view. The development of cable television holds some promise in this direction, but it will require more than new technologies to reverse the centripetal tendencies of our collective mentality. There must first be a revolutionary broadening of the horizons of those who define, seek out, report and interpret what is news, as well as a radically more nonconformist mind-set among opinion leaders which inspires and rewards the thinking of unthinkable thoughts.

Assuming that potential communicators have jumped the motivational hurdle -- have something to say and are ready to speak -- there is a second barrier to be overcome. They must have the communication competency to be understood. At the most primitive level, of course, this means the ability to speak and write the language of the audience -- a capacity which thirty years ago was thought to be within the near reach of every child in the United States, but which now, for many, is slipping away. Unless something drastic is done about the decay of our urban school systems we will have growing numbers of citizens who are functionally illiterate in our predominant tongue and who, for all practical purposes, are standing outside our system of freedom of expression looking in.

But as those in the speech-communication profession well know, the mere mastery of language is not enough. The rhetorical skills of invention, arrangement, style and delivery, with their interpersonal and mass media equivalents, are also essential for successful participation in the marketplace of ideas, and they elude even vaster numbers of people than those trapped in inner-city ghettos. I will forego any proposed solutions to this particular problem lest it appear that I am simply seeking jobs for the unemployed majors in our discipline.

A third element of the freedom to express oneself is what I have labelled de facto, in contrast to de jure, freedom of speech. It is not only government and the law which may inhibit expression. There are many private centers of power which may, in fact, be more repressive than the state. Individuals who have the desire to express themselves, and the competence to do so effectively, may remain silent out of fear of extra-legal punishment. They may, or believe they may, lose their job, a promotion or a raise if they say something which displeases their employer. They may, or believe they may, be ostracized by their family, their friends, their peers or their community if they deviate too far or too often from group norms. They may, or believe they may, be beaten up, vandalized, harassed by telephone or otherwise threatened if they anger one vigilante group or another. For some of these dangers, like physical harassment or being dismissed from certain kinds of employment for reasons

irrelevant to job performance, there are legal protections and remedies available and more should be considered. But only personal courage can provide a buffer against some of the others, at least until such time as the members of our society can be re-educated to appreciate, rather than to penalize, dissent.

A final basic precondition for a viable system of freedom of expression, when speakers are unrestrained by government censorship and have the motivation, competency and fortitude to speak, is the availability of channels through which their communication can reach its intended audience. This is not a problem at the interpersonal or small-group level, where face-to-face contact makes possible the direct exchange of messages, or even in small organizations or communities where posters, leaflets, loud speakers, and the like can sufficiently amplify the reach of the voice and pen. The problem becomes massive, however, when the issues to be addressed are national in scope -- and those are now the most critical ones in our lives -- and the audience is spread across the land.

To participate meaningfully in this arena one's messages must gain access to mass media of communication -- channels whose use costs large sums of money or is under the gate-keeping control of others, or both. The postal service is "freely" available to any who can afford the paper, printing, addressing and postage for mass mailings and the telephone for those who can hire banks of callers and pay for Watts lines, but even if an individual or group has the sizeable funds required to purchase advertising space in mass circulation newspapers and magazines or time on radio and television, the possibility of doing so is dependent on acceptance by the owners and managers of those channels. If one is in a position to generate newsworthy information or authoritative opinion and has the know-how to do it in a way that will attract coverage, one may gain free access to the media, although not necessarily in the format or with the twist that one may have desired. Indeed, when one sees the outcome one may wish that the letter to the editor had not been written, the press release not issued, the rally not planned, or other attention-getting act not performed. The problem, in its essence, is that in a modern mass culture the determination of the shape and range of ideas and images presented to the public is not in the hands of their authors but of the middlemen and women of the media who transmit them.

Nowhere has the access-to-media dilemma become more acute and apparent than in campaigns for the election of our public officials, one of the most important processes of decision-making in a democratic society. As the costs of political campaign communication has escalated, exacerbating the imbalance between those with financial resources and those without, our legislatures have experimented with a variety of measures to deal with the matter -- limits on campaign contributions, limits on spending, and public financing, for example -- each of which has produced as many new problems as it has solved old ones, not only from a First Amendment point of view, but in the effectiveness of the remedy as well.

So long as we continue in this country with our present scheme of privately-owned and profit-oriented channels of mass communication -- and

I see no prospect that this will ever change, nor do I envision a preferable alternative -- we are going to have to devise some system for preventing the monopolization of the media by their managers and by those who can afford to buy their way in. Fairness doctrines, equal-time rules, right-to-reply laws and spending limits have either been found constitutionally infirm or have been inadequate to do the job.

One possibility is the creation of publicly owned competing channels -- in radio, television and newsprint -- which are operated as free common carriers on a first-come, first-served, lottery, or fair-share basis -- Hyde Parks of the air and the printing press. Another option would be to impose a "tax" on private media, in return for the benefits they receive from the public (for example use of the airways and streets, favorable postal rates, and traffic controls, not to mention their profitability) -- a "tax" in the form of a contribution of a certain percentage of space or time as a regular feature on their medium for unedited public access -- again perhaps on a first-come, first-served, lottery, or fair-share basis of some sort. A special donation of this kind might also be required for the communications of candidates in political campaigns.

It is not my purpose here to spell out in detail the various possibilities which one might conceive, but simply to identify the problems and to suggest the directions in which I think we must go.

If some of what I have said sounds radical it is because I believe that we face serious dangers to the continued vitality of the First Amendment. It will not be enough for a majority of the justices of the United States Supreme Court to give to the freedom of speech clause its most vigorous possible interpretation. The legal right to express oneself must be woven into a psychological and economic fabric which makes more of that right than an empty promise.

Notes

1. Herbert Marcuse, "Repressive Tolerance," A Critique of Pure Tolerance (Beacon Press, 1965).
2. Jerome Barron, "Access to the Press - A New First Amendment Right," 80 Harvard Law Review 1641 (1967).
3. E.F. Schumacher, Small is Beautiful (Harper and Row, 1973).
4. Dean C. Barnlund and Franklyn S. Haiman, The Dynamics of Discussion (Houghton Mifflin, 1960), p. 12.
5. Erich Fromm long ago pointed out the crucial distinction between what he labelled "freedom from" and "freedom to" -- the former having to do with the liberation of the individual from the restrainst of external authority and the latter referring to what the individual does with that liberty. Escape From Freedom (Rinehart, 1941), pp. 35-37.
6. Political Freedom (Harper and Brothers, 1960), p. 26.